7. TRANSFER

Disclaimer: *A Practical Guide to the Indian Child Welfare Act* is intended to facilitate compliance with the letter and spirit of ICWA and is intended for educational and informational purposes only. It is not legal advice. You should consult competent legal counsel for legal advice, rather than rely on the *Practical Guide*.

25 U.S.C. § 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term—

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not included the unwed father where paternity has not been acknowledged or established;

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

25 U.S.C. § 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

Disclaimer: The above provisions of the Indian Child Welfare Act are set forth to facilitate consideration of this particular topic. Additional federal, state or tribal law may be applicable. Independent research is necessary to make that determination.

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Frequently Asked Questions

7.1 What is a transfer under the ICWA?

A transfer is the change of jurisdiction of certain Indian Child Welfare Act (ICWA) proceedings from state court to tribal court under § 1911(b). Transfer to the tribal court means that the tribal court makes decisions about the child's status and placement, and not the state court. Transfer is distinct from intervention and does not automatically occur when a tribe intervenes. Nor does transfer mean that physical and legal custody of the child must change.

7.2 What proceedings are subject to transfer from state court to tribal court?

Section 1911(b) provides for transfer from state court to tribal court of "any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe . . . ." The reference in § 1911(b) to "an Indian child not domiciled or residing within the reservation of the Indian child's tribe" refers to situations where jurisdiction is not exclusively in the tribes under § 1911(a). Where the child is a ward of the tribal court the tribe has exclusive jurisdiction and such cases do not fall under § 1911(b).

Practice Tip:
Many tribes wait until termination of parental rights appears imminent, or has taken place, to seek transfer of jurisdiction. While ICWA allows for the transfer of jurisdiction to tribal court at any point in the proceeding, state courts often view this delay negatively, which could jeopardize the tribes' ability to obtain transfer. Tribes should always immediately consider intervening and reserving the right to seek transfer of jurisdiction at a later time.

7.3 Who can petition for a transfer?

Pursuant to § 1911(b), a petition to transfer can be made by "either parent or the Indian custodian or the Indian child's tribe . . . ." Thus, even a parent who is not a member of the tribe may petition for a transfer to the tribe. *In re Shawnda G.*, 2001 WI App 194, 247 Wis. 2d 158, 634 N.W.2d 140.

7.4 What is a tribal court for purposes of the ICWA?

Section 1903(12) defines "tribal court" as "a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings." Thus, a tribal council can be a tribal court under the definition. *In re J.M.*, 718 P.2d 150, 154 (Alaska 1986). The term "tribal court" should be interpreted flexibly given the underlying philosophy of the ICWA that a tribal forum generally should decide issues related to Indian children. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

7.5 Does the transfer provision apply to proceedings over which the tribe has exclusive jurisdiction?

Section 1911(b) provides for transfer in those instances in which state and tribal courts have concurrent jurisdiction. Yet some courts treat transfer as available, indeed mandatory, for cases where jurisdiction is exclusively in the tribal court. *In re S.W.*, 2002 OK CIV APP 26, ¶ 26, 41 P.3d 1003, 1009 n.9 ("In contrast, transfer under Section 1911(a) is mandatory because exclusive jurisdiction there rests with the Tribal Court."); *In re Pima*

County Juvenile Action No. S-903, 635 P.2d 187 (Ariz. Ct. App. 1981) (transfering where jurisdiction exclusive to tribe under § 1911(a)). However, if there is no jurisdiction in the state court, a question arises as to whether dismissal rather than transfer should be required. *In re M.R.D.B.*, 787 P.2d 1219 (Mont. 1990) (holding motion to dismiss should be granted where exclusive tribal jurisdiction existed under § 1911(a)); *In re Baby Child*, 700 P.2d 198, 200-01 (N.M. Ct. App. 1985) (holding trial court should have granted motion to dismiss where child domiciled on reservation); *In re Halloway*, 732 P.2d 962 (Utah 1986) (holding Navajo motion to dismiss erroneously denied where Nation had exclusive jurisdiction under § 1911(a)).

ICWA itself provides for limited state jurisdiction in emergencies involving Indian children residing on or domiciled on the reservation, but temporarily located off the reservation. 25 U.S.C. § 1922.

7.6 Who can object to a transfer?

Any party can object to a transfer, but only a parent can veto a transfer. Section 1911(b) provides that either parent may object to a petition to transfer. Section 1903(9) defines parent as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child . . . ." Thus, in the case of an adopted child, only an Indian adoptive parent can veto the transfer.

7.7 What is the effect of a parental objection to a transfer under the ICWA?

In an action where the state and tribal courts have concurrent jurisdiction, an objection by a parent prevents the tribe from obtaining jurisdiction. *In re Maricopa County Juvenile Action No. JD-6982*, 922 P.2d 319, 323 (Ariz. Ct. App. 1996).

Practice Tip:
It is possible that a state court can still transfer a state court proceeding to tribal court under state law as a matter of forum non conveniens.

7.8 May a request for transfer be made orally?

There is no requirement that the request be made in writing and the Bureau of Indian Affairs (BIA) Guidelines provide for oral requests. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,590 (Nov. 26, 1979) (guidelines for state courts); *In re Shawnda G.*, 2001 WI App 194, ¶ 14, 247 Wis. 2d 158, 168, 634 N.W. 2d 140, 145-46 (holding a non-Indian parent's oral motion for transfer must be addressed). A parental objection to the transfer may also be made orally in open court.

7.9 Does an objection to a transfer of a foster care placement proceeding automatically carry over into a subsequent termination of parental rights proceeding?

Not necessarily. The two proceedings are legally distinct. *In re A.B.*, 2003 ND 98, ¶¶ 1-4, 663 N.W.2d 625, 627 (upholding transfer of termination of parental rights proceeding to tribal court where mother objected to foster care placement proceeding, but not termination of parental rights proceeding). For example, separate notice of a termination proceeding is required.

7.10 May a guardian *ad litem* veto a transfer by objecting?

No. A guardian *ad litem* can raise the issue of whether good cause not to transfer exists, but since the child is not given a right to object by § 1911(b), the guardian *ad litem* cannot veto a transfer. *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960 (Ariz. Ct. App. 2000). *But compare* Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 (Bureau of Indian Affairs Nov. 26, 1979) (guidelines for state courts) (suggesting that good cause "may exist if an Indian child over twelve objects to the transfer."). "[T]eenagers may make some unwise decisions . . . but their views should be taken into account." Indian Child Custody Proceedings, 44 Fed. Reg. at 67,591.

7.11 Must there be a hearing on the request for a transfer?

Section 1911(b) does not specifically require a hearing. However, there is general agreement that the parties should have an opportunity to present their views. The type of opportunity depends on the circumstances. Some courts require an evidentiary hearing on good cause. *In re M.C.*, 504 N.W.2d 598, 601 (S.D. 1993); *In re Shawnda G.*, 2001 WI App 194, ¶ 14, 247 Wis. 2d 158, 169, 634 N.W.2d 140, 146 n.13 (suggesting an evidentiary hearing is likely the most efficient course, but not deciding whether some other alternative would be adequate). Other courts have required less. *In re J.L.P.*, 870 P.2d 1252, 1259 (Colo. Ct. App. 1994) (indicating, without objection, an inclination to rule without further hearing where interested parties participated in oral arguments and briefing on the issues—due process satisfied.) *See also* Indian Child Custody

Proceedings, 44 Fed. Reg. 67,584, 67,590 (Bureau of Indian Affairs Nov. 26, 1979) (guidelines for state courts) (holding all parties need an opportunity to present their views to the court before transfer is denied on the grounds of "good cause").

7.12 What is the rationale for transferring jurisdiction of child custody proceedings from state court to tribal court?

In enacting ICWA, Congress specifically found "that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). The corrective provided by the ICWA is to recognize the sovereignty and primacy of tribal courts in making determinations regarding the placement and future of Indian children and to recognize that this is in the child's best interest. "At the heart of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989). *See also In re Armell*, 550 N.E.2d 1060, 1064 (Ill. App. Ct. 1990); *In re Halloway*, 732 P.2d 962, 965 (Utah 1986).

The ICWA is based on the presumption that tribal courts are best situated to decide the custody of Indian children. Thus, under the ICWA, even where a state court has initial jurisdiction over an Indian child the United States Supreme Court has held that the ICWA "creates concurrent but presumptively tribal jurisdiction" over such child. *Holyfield*, 490 U.S. at 36.

7.13 What distinct interests are protected by the transfer provision?

The legislative history indicates that the provision is intended to protect the rights of the child as an Indian, the rights of the Indian parents, and the rights of the tribe. H.R. REP. NO. 95-1385, at 21 (1978); *see also Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

7.14 Who bears the burden of proof of demonstrating "good cause to the contrary" so as to block a transfer?

The party opposing tribal court jurisdiction has the burden of proof. *In re T.I.*, 2005 SD 125, ¶¶ 17-19, 707 N.W.2d 826, 834; *In re A.B.*, 2003 ND 98 ¶¶ 14-18, 663 N.W.2d 625, 631; *In re C.R.H.*, 29 P.3d 849, 854 (Alaska, 2001); Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 (Bureau of Indian Affairs Nov. 26, 1979) (guidelines for state courts).

7.15 What constitutes "good cause to the contrary" to justify a decision not to transfer?

The ICWA does not define "good cause to the contrary." Generally, according to the legislative history "[t]he subsection is intended to permit a State court to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected." Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 (Bureau of Indian Affairs Nov. 26, 1979) (guidelines for state courts) (quoting H.R. REP. NO. 95-1386, at 21 (1978)); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 165 (Tex. App. 1995). The question is whether "the evidence necessary to decide the case could not be adequately presented in tribal court without undue hardship to the parties or the witnesses." Indian Child Custody Proceedings, 44 Fed. Reg. at 67,591. Mere distance is not sufficient to deny a transfer based on good cause. *In re Pima County Juvenile Action No. S-903*, 635 P.2d 187 (Ariz. Ct. App. 1981) (holding that distance from reservation does not establish good cause despite financial burden and fact that qualified expert witnesses with knowledge of tribal culture of a Montana tribe are more available in Montana; argued against retention by state court in Arizona). Nor is the inconvenience of having all of witnesses travel to the tribal court, sufficient, if hardship is not undue. *In re J.C.D.*, 2004 SD 96, ¶¶ 12-14, 686 N.W.2d 647, 650. *But see Chester County Dep't of Soc. Servs. v. Coleman* (*Coleman II*), 399 S.E.2d 773, 776 (S.C. 1990) (finding undue hardship where the tribal court was situated in South Dakota and all witnesses and key evidence were in South Carolina); *C.E.H. v. L.M.W.*, 837 S.W.2d 947, 953 (Mo. Ct. App. 1992) (finding undue hardship where all witnesses and key parties were in Missouri and tribal court was in Oklahoma).

The BIA Guidelines, although not binding, list representative factors which may constitute good cause to deny a petition for a transfer:

Determination of Good Cause to the Contrary

(a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.

(b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:

> (1) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.
>
> (2) The Indian child is over twelve years of age and objects to the transfer.
>
> (3) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.
>
> (4) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

Indian Child Custody Proceedings, 44 Fed. Reg. at 67,590.

Some of these factors have been questioned by courts as to whether they are consistent with congressional intent. *See, e.g., In re J.C.D.*, 2004 SD 96, 686 N.W.2d 647 (holding that lower court erred in denying transfer of guardianship petition to tribal court); *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960 (Ariz. Ct. App. 2000). State courts may still transfer jurisdiction to tribal courts when one or more of these representative factors are present.

Practice Tip:
When good cause not to transfer is an issue, undue hardship to the parties or witnesses may be overcome by having the tribal court sit at the site where most witnesses are located. The BIA Guidelines expressly contemplate this approach and some courts have approved of it. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 (Nov. 26, 1978) (guidelines for state courts); *In re A.B.*, 2003 ND 98, ¶¶ 21-26, 663 N.W.2d 625, 633. *Cf. In re S.W.*, 2002 OK CIV App 26, ¶¶ 56-57, 41 P.3d 1003, 1015 (holding distance not an overwhelming factor and the Nation has the capability of holding court nearer to Tulsa county); *In re Pima County Juvenile Action No. S-903*, 635 P.2d 187, 189 (Ariz. Ct. App. 1981) (holding that in ICWA Congress created a new jurisdictional framework in Indian child welfare, replacing the outmoded geographical concepts of presence or domicile with a jurisdictional standard based on the ethnic origin of the child). It is clear from the federal law that Indian tribes have concurrent jurisdiction over all of its children involved in child custody proceedings arising outside the reservation, so off-reservation areas would fall within a tribe's jurisdiction. Tribes might benefit from adopting a provision allowing cases to be heard off the reservation. *Cf.* 7 N.N.C. § 301 (2005) (generally authorizing Navajo Nation Supreme Court to hold hearings outside the Nation). *But see Yavapai-Apache v. Mejia*, 906 S.W.2d 152 (Tex. App. 1995) (rejecting the solution of having tribal court sit outside its own territory because it has no jurisdiction outside its boundaries).

7.16 What level of proof of "good cause to the contrary" must be shown?

Most courts have held that "good cause to the contrary" must be shown by "clear and convincing evidence." *In re M.E.M.*, 635 P.2d 1313, 1317 (Mont. 1981); *In re Armell*, 550 N.E.2d 1060, 1064 (Ill. App. Ct. 1990); *In re S.W.*, 2002 OK CIV APP 26, ¶ 46, 41 P.3d 1003, 1013. A high standard is consistent with the underlying philosophy of the ICWA that a tribal forum is preferred for such determinations. Nevertheless, some courts have used lower standards. *See, e.g., In re J.L.P.*, 870 P.2d 1256 (Colo. Ct. App. 1994) (using abuse of discretion). The Supreme Court of South Dakota, in the case of *In re T.I.*, 2005 SD 125, ¶¶ 14-19, 707 N.W.2d 826, 833-34, noted that it had previously adopted an abuse of discretion standard. In this case, it reversed that ruling and adopted the clear and convincing standard, concluding that mere discretion to override the presumption of tribal court jurisdiction in the ICWA, is inconsistent with congressional intent.

7.17 In cases where courts have decided to apply the BIA Guidelines, what constitutes an advanced stage of the proceedings for purposes of the "good cause to the contrary" inquiry?

The ICWA includes a presumption that Indian child custody proceedings are best heard in tribal court, and the United States Supreme Court has ruled that a presumption in favor of tribal court jurisdiction exists under the ICWA that an Indian child custody proceeding should be transferred to tribal court. The BIA Guidelines, in their interpretation of good cause not to transfer under § 1911(b) of the ICWA, state that one of the reasons to deny transfer of jurisdiction of an Indian child custody proceeding from state court to tribal court is if the proceeding is at "an advanced stage" at the time the tribe or another party files a motion to transfer jurisdiction to tribal court in the state court. Indian Child Custody Proceedings,

44 Fed. Reg. 67,584, 67,590 (Nov. 26, 1979) (guidelines for state courts). Commentary to Guideline C.1 indicates that the good cause inquiry is meant to avoid improper manipulation of the system:

> Permitting late transfer requests by persons and tribes who were notified late may cause some disruption. It will also, however, provide an incentive to the petitioners to make a diligent effort to give notice promptly in order to avoid such disruptions . . . . Timeliness is a proven weapon of the courts against disruption caused by negligence or obstructionist tactics on the part of counsel. If a transfer petition must be honored at any point before judgment, a party could wait to see how the trial is going in state court and then obtain another trial if it appears the other side will win. Delaying a transfer request could be used as a tactic to wear down the other side by requiring the case to be tried twice. The Act was not intended to authorize such tactics and the "good cause" provision is ample authority for the court to prevent them.

Id. Good cause will depend on the circumstances of the case. Mere passage of time does not necessarily lead to a conclusion that proceedings are at an advanced stage. *In re Ashley R.*, 863 P.2d 451 (N.M. Ct. App. 1993) (holding request not untimely where served on day of guardianship hearing where no activity had previously occurred and request made six weeks after notice); *In re J.L.P.*, 870 P.2d 1252 (Colo. Ct. App. 1994) (holding one year delay not untimely where proceedings not at an advanced stage). *But see In re S.G.V.E.*, 2001 SD 105, 634 N.W.2d 88 (denying tribe's request to transfer termination proceeding 14 months after notice of petition and two months after final disposition terminating parental rights as untimely); *In re A.P.*, 1998 MT 176, 289 Mont. 521, 962 P.2d 1186 (denying tribe's request to transfer termination proceeding one month after termination order had been entered as untimely).

Practice Tip:

The BIA Guidelines and the case law that has adopted the BIA's rationale causes problems in implementing the placement provisions of the ICWA. In many ICWA cases, the Indian child's tribe will intervene in the proceeding but will leave jurisdiction initially with the state court because the parents live off-reservation and the plan is to reunite the child with the family, services to assist the family are more available in the community where the family lives and the case is being heard, and witnesses who can testify about the family's condition and circumstances and the facts justifying jurisdiction over the child live and work where the family is located. The tribe participates in the services and reunification process, but does not want to disrupt the plan to reunify the family by transferring the case immediately to tribal court.

In many cases, the initial or foster placement for the Indian child may not be a preferred option under the ICWA because homes fitting the preference criteria are not readily available. The longer an Indian child is in a non-preferred home, however, the more inertia builds toward keeping the child in that home when the case turns from reunification to permanency. The tribe tends to become more involved in an ICWA case in state court once the state decides that reunification is no longer a viable option, and seeks permanent placement of the Indian child. This stage is where the tribe's interest in retaining its children in the tribal community and culture becomes most important, and the tribe and tribal court are best equipped to make an appropriate permanent placement of the child. Unfortunately, by this stage the state court proceeding is usually at "an advanced stage" as defined by the BIA Guidelines because it has been going on for some time, and a party opposed to transfer can successfully obstruct transfer by raising the BIA Guidelines with the state court as a reason to deny transfer of jurisdiction of the placement phase of the case to tribal court.

There is no strategy that will work for all cases to overcome this problem. In many cases, it works for the Indian child's tribe to announce in writing and/or to the court at the beginning of the case that the tribe intends to leave jurisdiction with the state court while the plan remains reunification—for the reasons listed above or for other reasons—and to put the court and agency on notice that if and when the case turns to permanency, the tribe intends to transfer that phase of the proceeding to tribal court. In other cases, it may be necessary for tribal social services to research and advocate initially for an appropriate placement that may not be as convenient for the parents or family who are working towards reunification, but will already be the tribe's preferred placement when the case turns to permanency instead of reunification. Flexibility and creativity are the keys to preserving the tribe's placement options throughout an ICWA proceeding in state court.

7.18 Should the best interest of the child constitute "good cause" not to transfer?

No. Congress believed that a proper implementation of the Act itself would be in the "best interest of an Indian child." *See* H.R. REP. NO. 95-1386, at 19 (1978). Section 1911(b) reflects a *federal* determination that transfer of jurisdiction is in the child's best interests. *In re J.L.G.*, 687 P.2d 477 (Colo. Ct. App. 1984) ("Congress passed [ICWA] with the express purpose of protecting the best interests of Indian children . . . ."); *In re Pima County Juvenile Action No. S-903*, 635 P.2d 187, 189 (Ariz. Ct. App. 1981) ("The Act is based on the fundamental assumption that it is in the Indian child's best interests that its relationship to the tribe be protected."); *In re S.B.R.*, 719 P.2d 154, 156 (Wash. Ct. App. 1986) (same); *In re Q.G.M.*, 808 P.2d 684, 685 n.2 (Okla. 1991) (same); *In re Armell*, 550 N.E.2d 1060, 1065-66 (Ill. App. 1990) (same).

To argue that transfer is contrary to the "best interest" of an Indian child ignores the statutory presumptions that a tribal court will act in the best interest of the Indian child, that the tribal court should decide the placement and future of the Indian child involved, and that the Indian child and tribe should continue to retain their ties. *Armell*, 550 N.E.2d 1060 (holding state's best interest of the child considerations cannot establish "good cause"); *Pima County S-903*, 635 P.2d 187; *In re J.L.P.*, 870 P.2d 1252 (Colo. Ct. App. 1994) (holding adoption of best interests standard would defeat purpose underlying ICWA); *In re Ashley R.*, 863 P.2d 451 (N.M. Ct. App. 1993) (holding state's best interest standard inapplicable when considering transfer of jurisdiction); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 169 n.11 (Tex Ct. App. 1995); *In re A.B.*, 2003 ND 98, ¶¶ 26-30, 663 N.W.2d 625, 634 (holding best interest of child not a consideration for threshold decision of proper forum). *Cf. Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 53 (1989).

Nevertheless, some courts feel they can take into account whether, in their judgment, a transfer will be in the best interest of the child. See *In re Maricopa County Juvenile Action No. JS-8287*, 828 P.2d 1245 (Ariz. Ct. App. 1991); *In re C.W.*, 479 N.W.2d 105 (Neb. 1992); *Chester County Dep't of Soc. Servs. v. Coleman* (*Coleman II*), 399 S.E.2d 773 (S.C. 1990); *In re T.S.*, 801 P.2d 77 (Mont. 1990); *In re J.J.*, 454 N.W.2d 317 (S.D. 1990); *In re N.L.*, 754 P.2d 863, 869 (Okla. 1988); *In re Robert T.*, 246 Cal. Rptr. 2d 168, 174-75 (Ct. App. 1988).

7.19 Is perceived inadequacy of the tribal system a valid good cause consideration?

No. The BIA Guidelines provide that "[s]ocio-economic conditions and the perceived adequacy of tribal or [BIA] social services or judicial system may not be considered in a determination that good cause exist." Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 (Nov. 26, 1979) (guidelines for state courts). The courts agree. *In re Armell*, 550 N.E.2d 1060 (Ill. App. Ct. 1990); *In re J.J.*, 454 N.W.2d 317, 329 (S.D. 1990).

7.20 Is a dismissal of the state court proceeding necessary to transfer to tribal court?

Normally a state case is dismissed upon transfer to the tribal court, although the tribal court exercise of jurisdiction is not dependent upon formal dismissal.

7.21 What happens if a tribal court declines the transfer?

The case remains in state court. *In re T.A.G.*, 1999 MT 142N, 294 Mont. 556, 996 P.2d 885 (unpublished table decision) *available at* No. 97-524, 1999 WL 506107 (Mont. June 15, 1999). See also, FAQs 8.4, 8.5, 8.16, Role of Tribal Courts.

7.22 What effect does Public Law 280 have on § 1911(b)?

It has no effect. Tribes in Public Law 280 states can exercise jurisdiction under § 1911(b) the same as all other tribes.

Some confusion has been caused by § 1918(a) which allows tribes in Public Law 280 states to "reassume jurisdiction over Indian child custody proceedings." The Alaska Supreme Court originally held that the only way to make sense of § 1918 was to conclude that Public Law 280 states have exclusive jurisdiction over child custody proceedings. *Native Village of Nenana v. State*, 722 P.2d 219 (Alaska 1986). That decision was overruled in *In re C.R.H.*, 29 P.3d 849, 852 (Alaska 2001), which held that native tribes have jurisdiction to accept transfers under § 1911(b) without having to first petition the Secretary for reassumption under § 1918(a). This is consistent with the "longstanding position of the Office of the Solicitor that a tribe in a Public Law 280 state does not have to submit a petition under § 1918 of the ICWA to reassume transfer jurisdiction under § 1911(b)." Memorandum from Robert McCarthy, Field Solicitor, United States Department

of the Interior, to Pacific Regional Director, Bureau of Indian Affairs (July 28, 2005) (on file with the Native American Rights Fund) (available on the web site version). Accord, *In re M.A.*, 40 Cal. Rptr. 3d 439, 441-43 (Ct. App. 2006), which held that for a child not domiciled on the reservation, a tribe need do nothing under § 1918 to have jurisdiction over a transfer; reassumption of jurisdiction under § 1918 refers to reassumption of exclusive jurisdiction. *Id.* at 443. The court specifically held that Public Law 280 only granted the state concurrent jurisdiction, it did not extinguish the tribe's preexisting jurisdiction. *Id.*

**** Access to the full-text of opinions and additional materials is at www.narf.org/icwa ****

The following list is representative of cases that discuss the topic. The list is not exhaustive. The practitioner should conduct independent research.

FEDERAL CASES

United States Supreme Court
Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989)

District Courts
Brown ex rel. Brown v. Rice, 760 F. Supp. 1459 (D. Kan. 1991)
Comanche Indian Tribe of Okla. v. Hovis (*Hovis I*), 847 F. Supp. 871 (W.D. Okla. 1994)

STATE CASES

Alabama
R.B. v. State, 669 So. 2d 187 (Ala. Civ. App. 1995)

Alaska
In re C.R.H., 29 P.3d 849 (Alaska 2001)
In re J.M., 718 P.2d 150 (Alaska 1986)
Native Village of Nenana v. State, 722 P.2d 219 (Alaska 1986)

Arizona
In re Maricopa County Juvenile Action No. JD-6982, 922 P.2d 319 (Ariz. Ct. App. 1996)
In re Maricopa County Juvenile Action No. JS-7359, 766 P.2d 105 (Ariz. Ct. App. 1988)
In re Maricopa County Juvenile Action No. JS-8287, 828 P.2d 1245 (Ariz. Ct. App. 1991)
Michael J., Jr. v. Michael J., Sr., 7 P.3d 960 (Ariz. Ct. App. 2000)
In re Pima County Juvenile Action No. S-903, 635 P.2d 187 (Ariz. Ct. App. 1981)

California
In re Larissa G., 51 Cal. Rptr. 2d 16 (Ct. App. 1996)
In re M.A., 40 Cal. Rptr. 3d 439 (Ct. App. 2006)
In re Robert T., 246 Cal. Rptr. 168 (Ct. App. 1988)
In re Vincent M., 59 Cal. Rptr. 3d 439 (Ct. App. 2007)

Colorado
In re A.T.W.S., 899 P.2d 223 (Colo. Ct. App. 1994)
J.C.T. v. Three Affiliated Tribes, 155 P.3d 452 (Colo. Ct. App. 2006)
In re J.L.G., 687 P.2d 477 (Colo. Ct. App. 1984)
J.L.P., 870 P.2d 1252 (Colo. Ct. App. 1994)

Illinois
In re Armell, 550 N.E.2d 1060 (Ill. App. Ct. 1990)
In re S.S., 657 N.E.2d 935 (Ill. 1995)

Indiana
In re D.S., 577 N.E.2d 572 (Ind. 1991)
In re T.R.M., 525 N.E.2d 298 (Ind. 1988)

Iowa
In re A.E., 572 N.W.2d 579 (Iowa 1997)

In re B.M., 532 N.W.2d 504 (Iowa Ct. App. 1995)
In re J.R.H., 358 N.W.2d 311 (Iowa 1984)
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